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No. 88-1904

In the Supreme Court of the United States

OCTOBER TERM, 1989

WALKER TOWING CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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26 pp

QUESTIONS PRESENTED

Petitioners' vessels and cargoes were damaged when an ice jam on the Ohio River broke and large quantities of ice and water moved downriver. The questions presented are:

1. Whether the court of appeals correctly determined that certain of the acts and omissions of government employees that allegedly caused the ice jam to form involved the performance of discretionary functions.

2. Whether, in actions under the Suits in Admiralty Act, 46 U.S.C. 741-752 (Supp. IV 1986), the United States is immune from liability for the performance of discretionary functions.

3. Whether, in its review of the trial court's findings of fact, the court of appeals misapplied the "clearly erroneous" standard prescribed by Fed. R. Civ. P. 52(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 862 F.2d 1237. The memorandum and order of the district court denying a motion by the government for summary judgment is reported at 579 F. Supp. 1273. The post-trial opinion of the district court (Pet. App. A29-A156) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A24-A25) was entered on December 5, 1988. A petition for rehearing was denied on February 28, 1989 (Pet. App. A26).[1] The petition for a writ of certiorari was filed on

[1] The petition was entitled "Petition of Walker Towing Corporation and B-R Services, Inc., for Rehearing by the Court En Banc" and did not, by its terms, seek rehearing by the panel. However, the court of appeals referred the petition to the panel, apparently treating it as a petition for rehearing as well as a suggestion for rehearing en banc. See Sup. Ct. R. 20.4.

May 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 27, 1978, an "ice gorge" on the Ohio River broke under the pressure of heavy floodwaters. The resulting surge of ice and water caused property damage to petitioners' vessels and cargoes. Petitioners filed an action against the United States under the Suits in Admiralty Act, 46 U.S.C. 741-752 (Supp. IV 1986), alleging that the ice gorge had formed as a result of negligence by the Army Corps of Engineers in the operation of the Markland Dam and Locks complex. The district court found that the Corps had been negligent in failing to pass sufficient quantities of ice through the Markland dam during the period preceding the casualty and that this negligence had caused ice to accumulate upstream of the dam, ultimately leading to the formation of the ice gorge. The court entered judgment for petitioners. Pet. App. A29-A158. The court of appeals reversed. *Id.* at A1-A23.

1. The Markland complex, which spans the Ohio River between Indiana and Kentucky some 61 miles below Cincinnati, includes a hydroelectric plant on the Indiana side of the river, a main lock and a smaller auxiliary lock on the Kentucky side, and twelve large "tainter gates." These tainter gates, each of which is 100 feet wide and 42 feet high, can be raised off their sills on the riverbed to regulate the amount of water flowing beneath them. Pet. App. A3.

When the dam was built, five of the gates were also designed to be "submergible"—*i.e.*, capable of being lowered into recesses in the riverbed so that water could carry ice or other debris over them. However, after the Corps encountered problems with submergible gates at other dams

on the Ohio River, personnel were not allowed to operate the gates in the submerged position, and the gates' submergible feature was later "incapacitated" (Pet. App. A125). In order to pass ice through the tainter gates in 1978, it was necessary to raise at least two adjacent gates 10-12 feet each so that ice would be sucked below them. However, concentrating all flow through the dam in two adjacent gates could "scour" the riverbed immediately downstream of the dam—thus threatening the structural integrity of the dam itself—unless the downstream pool was deep enough to alleviate that problem. If the downstream pool was not deep enough, additional gates would have to be raised simultaneously to pass ice. Pet. App. A3-A4.

Using the tainter gates to pass ice was practicable only when the flow in the river was sufficient to allow the appropriate number of gates to be raised the requisite amount without lowering the level of the pool upstream of the dam. Raising one gate ten feet off its sill in the riverbed would result in the release of 30,000 to 50,000 cubic feet of water per second. Thus, to raise two adjacent gates required 60,000 to 100,000 cubic feet per second of flow. Raising additional gates required proportionally greater amounts of water. During the 10-day period preceding the casualty, river flows—which ranged from 87,000 to 130,000 cubic feet per second—were relatively low. To the extent that the Corps directed water to the hydroelectric plant—which used 35,000 cubic feet per second when operating at full capacity—that flow was unavailable to facilitate the passage of ice. See Pet. App. A2-A4; Pet. 7.

The locks were also potentially available as means of passing ice. However, a design problem made it impractical to use the main lock for this purpose, and it was also used to move traffic on the river past the dam. Until January 19, 1978, eight days before the casualty in this case, the auxiliary lock could not be employed to pass ice

because of a broken "latch pin"—an 80-foot stainless steel rod used to secure one of the lock's gates in its recessed position. Soon after the latch pin was replaced, a boat owned by the Corps became frozen in the lock's chamber, keeping the auxiliary lock out of service as a means of passing ice. Pet. App. A4-A5.

In January 1978, during an extended period of cold weather, large quantities of ice accumulated above the Markland dam. On January 25 and 26, rain, a blizzard, and near-zero temperatures struck the Ohio River Basin, causing the river to rise rapidly. At some point, an ice gorge formed some 16.5 miles upstream of the Markland complex. On January 27, the gorge broke, and large quantities of water and ice surged downriver, causing substantial damage. Petitioners' barges were sunk or damaged. Pet. App. A5-A9.

2. After a trial, the district court concluded that the Corps had been negligent in eight specified respects and that those negligent acts and omissions—which generally involved the failure to take steps to pass sufficient ice through the Markland dam—had proximately caused the formation of the ice gorge.[2] The court awarded petitioner Walker Towing $1,500,000 and petitioner B-R River Serv-

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[2] Those acts and omissions were (1) failing to conduct periodic inspections of the "pool" above the dam; (2) "failing to pass floating ice at Markland Dam as it arrived at the dam, whether through use of the underflow gates or otherwise;" (3) failing to periodically restrict the amount of water being diverted to the hydroelectric plant so that additional flow would be available for ice-passing efforts; (4) failing to perform necessary maintenance to ensure that the auxiliary lock would be available for ice-passing; (5) permitting a Corps boat to become frozen into the auxiliary lock; (6) failing to train lock personnel in available means of passing ice at low flows; (7) failing to coordinate activities between Markland and Meldahl, the next dam upstream on the river; and (8) failing to maintain Markland in a con-

ices $569,319.60 (a figure reflecting a finding that B-R's negligence was 60% responsible for its losses), together with prejudgment interest. Pet. App. A150-A154.

3. The court of appeals reversed. It organized the acts and omissions on which the district court had based liability into six categories (Pet. App. A16):

> 1) failure of the Corps to conduct periodic inspections of the Markland pool; 2) failure to replace the broken latch pin in a timely manner and allowing the pusher boat to become frozen in the auxiliary lock chamber; 3) failure to sufficiently train lock personnel; 4) failure to restrict the flow to the hydroelectric plant in order to have more flow through the gates, thereby increasing Markland's ice-passing capacity; 5) failure to coordinate ice-passing activities with Meldahl [the next dam upstream of Markland] and to follow the same policy that Meldahl followed in maximizing the passage of ice; and 6) failure to compensate for the immobilization of the submergible tainter gates.

The court held that the last three of these actions involved the discretionary exercise of policy judgment and thus could not serve as the basis for a judgment for damages against the United States. It concluded that the first three, standing alone, "were not substantial factors in causing the disaster." *Id.* at A17, A23.

The court of appeals first addressed the fourth category listed above: the Corps' decision to maintain the flow of

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dition which would, after the submergible gates were incapacitated, permit passage of ice at low flows. Pet. App. A137-A142.

The district court rejected the government's contention that the discretionary function exception was applicable to actions to which the plaintiffs sought to attach liability. Pet. App. A123-A129. It had previously denied a motion for summary judgment based on that exception. *In re Ohio River Disaster Litigation*, 579 F. Supp. 1273 (S.D. Ohio 1984).

water to the hydroelectric plant. The panel referred to the district court's finding that, because of a strike by coal miners, the Governor of Indiana had put pressure on senior Corps officials to keep the hydroelectric plant operating at maximum output. Pet. App. A17. Relying on testimony from Corps officials in the chain of command from the Division Engineer for the Ohio River Division down to the lockmaster at Markland, the panel determined that the Division Engineer had weighed "the competing needs for power and navigability" and decided "that the need to generate power should prevail." *Id.* at A18. Accordingly, the panel held that the district court's finding that the lockmaster at Markland had decided not to divert water from the dam was clearly erroneous. *Ibid.* Finding that the Markland lockmaster "was merely carrying out the discretionary decisions of his superiors" in January 1978, the court of appeals concluded that the district court "correctly recognized that the character of the power plant decision by Corps policymakers was discretionary, but it clearly erred in concluding that this decision was never effectuated." *Id.* at A18-A19.[3]

The court of appeals did not disturb the district court's finding that the Corps had failed to coordinate ice-passing activities between Meldahl and Markland—*i.e.*, that Corps personnel had passed substantially greater quantities of ice at Meldahl, which was 90 miles upriver from Markland, than at Markland. Pet. App. A20. But, differing with the district court's legal analysis on two points, the panel held that any such failure could not serve as the

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[3] The district court observed that if the Corps had formally or informally ordered the flow to be maintained to the power plant, the court would "likely * * * see that as a policy determination isolated from challenge by the discretionary function exception." Pet. App. A17.

basis for a judgment against the United States. First, it noted that Corps officials exercising oversight control over the two dams had made a discretionary judgment not to direct lower-ranking personnel at Meldahl to cease passing ice. *Ibid.*; see *id.* at A82-A86. Observing that "[e]ven the negligent failure of a discretionary government policy-maker to consider all relevant aspects of a subject matter under consideraton does not vitiate the discretionary character of the decision that is made," the court stated that "[w]hether this was the correct decision [was] not for [the court] to second-guess." *Id.* at A20 (quoting *Myslakowski v. United States,* 806 F.2d 94, 97 (6th Cir. 1986), cert. denied, 480 U.S. 948 (1987)). Second, the court of appeals took issue with the district court's suggestion that Markland personnel should have "emulated Meldahl and passed ice." Pet. App. A21. The panel explained that "the problems at Markland were unique," since "Meldahl personnel never had to balance the competing interests of navigation and generation of electricity." *Ibid.* "Once the discretionary decision to continue supplying the hydroelectric plant with water was made at Markland," the court continued, "the courses of action open to Markland personnel were far more limited than the courses of action open to Meldahl personnel." *Ibid.*

The court then took up each of the three alternative means of passing ice at Markland—through the auxiliary lock, through the main lock, or beneath two or more raised tainter gates. Pet. App. A21-A22. The panel did not disturb the district court's finding that the Corps had been negligent in allowing the auxiliary lock to become unavailable, but determined that "[t]he significance of this negligence is small." *Id.* at A21. With respect to the main lock, the court noted that the Corps had made a decision to move boats and ice together through that chamber, rather than suspending navigation and devoting the chamber ex-

clusively to passing ice; the panel held that the "decision to maintain navigation at the expense of passing ice * * * is a decision the Corps is uniquely qualified to make, and is protected by the discretionary function exception." *Id.* at A22. Similarly, the court of appeals determined that concern about "scour" had led the Corps to avoid passing ice beneath two adjacent tainter gates; it concluded that "[t]he Corps' weighing of the need to pass ice against the concern for the structural integrity of the dam is protected by the discretionary function exception." *Ibid.* Noting that the district court had correctly held that the elimination (by immobilization) of the submergible feature of the tainter gates was protected by the discretionary function exception, the panel held that "[i]t was error for [that court] to then hold that the Corps' failure to compensate for the immobilization was negligent." *Ibid.*

The court of appeals determined that three of the acts or omissions that the district found to be negligent—the sequence of actions that caused the auxiliary lock to become unavailable for the purpose of passing ice, the failure to conduct surveillance of the river, and inadequate training of personnel at Markland in handling ice conditions—were outside the discretionary function exception. Pet. App. A21-A22, A23; see *id.* at A16. However, the court concluded that these actions, "standing alone, were not substantial factors in causing the disaster." *Id.* at A23.[4]

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[4] The court of appeals did not reach the government's contentions that the district court's conclusions on causation and due care were in error. Pet. App. A13. In the government's view, the district court's opinion effectively made the United States an insurer for an unprecedented natural disaster, and rested on an untenable finding that the operation of a dam proximately caused a catastrophic ice gorge to form over 15 miles upriver. These contentions remain available as alternative grounds for affirming the judgment below.

ARGUMENT

1. Petitioners' first contention is that the court of appeals misapplied the discretionary function exception to the unusual facts of this case. Pet. 10-14. They maintain that the district court found the United States liable because personnel at Markland violated a 1964 order that "governed operations at Markland during ice conditions" (*id.* at 14) and, citing *Berkovitz* v. *United States,* 108 S. Ct. 1954 (1988), that negligence of that type is not protected by the discretionary function exception. The contention that the 1964 order deprived the Corps of all discretion to weigh competing considerations in the operation of the Markland complex is without merit. But in any event, that contention raises only the question whether petitioners' implausible understanding of that directive is correct, an issue plainly undeserving of this Court's review.

a. The court of appeals' formulation of the discretionary function exception is fully consistent with the Court's decision in *Berkovitz.* In that case, the Court noted that the application of the discretionary function exception is "guided by several established principles." 108 S. Ct. at 1958. "[A] court must first consider whether the action is a matter of choice for the acting employee. * * * [T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Ibid.* Second, "assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield"—*i.e.,* whether the actions or decisions are "based on considerations of public policy." *Id.* at 1959. The court of appeals' analysis was fully consistent with those principles. In fact, after review-

ing this Court's precedents at length, the panel specifically invoked *Berkovitz*'s conclusion that the discretionary function exception "applies only to conduct that involves the permissible exercise of policy judgment." Pet. App. A16.[5] The court of appeals accurately stated the principles that guide the application of the discretionary function exception, and petitioners do not suggest otherwise.

Further, unless the 1964 order on which petitioners rely deprived the Corps of all discretion, this case involves precisely the kind of policy judgment that the discretionary function exception shields from liability. As the court of appeals noted, in determining whether to divert water from the hydroelectric plant to ice-passing operations, the Corps was required to weigh Southern Indiana's need for electricity, during a harsh winter accompanied by a coal miners' strike, against the possible benefits of passing additional ice through the Markland dam. Pet. App. A17-A19. Once the decision was made to maintain the flow of water to the plant, the Corps had to consider the relative merits of passing ice through two adjacent tainter gates, a course that could "scour" the riverbed downstream and threaten the dam's integrity, and holding ice above the dam, a course with potential implications for navigation and safety. *Id.* at A22. Similarly, "[t]he decision to maintain navigation at the expense of passing ice [through the main lock]" involved the weighing of the interests of navigation and ice-passing and was thus "a decision that the Corps [was] uniquely qualified to make." *Ibid.* Tradeoffs by government officials between considerations of this type are plainly protected by the dis-

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[5] Indeed, the full Sixth Circuit anticipated this aspect of *Berkovitz* when it decided, in *Chotin Transportation, Inc.* v. *United States*, 819 F.2d 1342, 1345, 1347 (*en banc*), cert. denied, 108 S. Ct. 344 (1987), that the United States could be held liable based upon a lockmaster's "negligent performance in ignoring the government's regulations."

cretionary function exception as it was construed in *Berkovitz*.

The court of appeals was also correct in refusing to assess the quality of the Corps' decisionmaking in areas in which it exercised policy judgment. The exception applies not only to the performance of a discretionary function, but also to "the failure to exercise or perform a discretionary function or duty * * * whether or not the discretion involved be abused." See 28 U.S.C. 2680(a). Thus, as the Sixth Circuit noted, courts are not to "second-guess" the correctness of decisions over which federal officials exercise discretion: "[e]ven the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made." Pet. App. A20.[6] In light of these principles, the court of appeals' refusal to base liability on an allegedly negligent failure to coordinate operations at Meldahl and Markland was not "incomprehensible," as petitioners contend (Pet. 14), but entirely justified. Once the court determined that the coordination of those facilities implicated matters of policy judgment, it properly refused to

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[6] The district court's conclusion that the Corps had been negligent in failing to reduce the flow of water to the hydroelectric plant demonstrates the kind of judicial intrusion in policy choices that the discretionary function exception is designed to avoid. The court stated (Pet. App. A138):

> We do not question that [it] was important, given the other problems extant in January 1978, to keep the plant operating as much as possible. We also do not question, however, that the Corps' principal obligation is safe maintenance of Markland as a navigation facility.

Plainly, findings of this type intrude on the discretion of Executive Branch officials to determine which permissible policy objectives are to have what priority.

inquire further—for instance, by considering whether the Corps failed to gather relevant information or weighed pertinent considerations unwisely. See *Shuman* v. *United States,* 765 F.2d 283, 290 (1st Cir. 1985) ("Lack of due care in promulgating a policy, or in having no policy or program at all on an issue, however imprudent it might seem, is encompassed within the discretionary function exception.").

b. Petitioners' argument that *Berkovitz* requires a decision in their favor thus rests entirely on their interpretation of the 1964 order issued by the Division Engineer in charge of the Ohio Valley Division to his subordinates throughout the region (Pet. App. A161-A167). Petitioners place particular emphasis on an excerpt from that directive that stated (Pet. 12-13):

> Non-moving sheets of ice give no problems. It is only when ice starts to move under natural conditions (and efforts to move otherwise are of little effect) that a hazard is created. The only safe operation then is to pass all ice through the dam as it arrives, and to have essential provisions for its passage.

As petitioners construe it, this language obligated personnel at Markland to pass all moving ice through the complex without regard to any of the policy considerations that the court of appeals cited. In their view, when the court of appeals determined that the Corps had made a discretionary decision to maintain the flow of water to the hydroelectric plant, it ignored "pre-existing policy judgments by superiors in the Louisville District Office" and "failed to recognize the predominant policy determination of the Corps that moving ice be passed as it arrived at the dam." Pet. 13-14.

Petitioners erroneously contend that this order deprived Corps' personnel of all policy discretion on the matters

relevant to this case. The order was silent on the questions whether and under what circumstances flow should be restricted to the hydroelectric plant at Markland. Since the order was addressed to all facilities in the Ohio River Division, it could not possibly be viewed as an expression of any position on the relative merits of power and ice-passing operations at Markland, let alone a binding determination that a major source of electricity for Southern Indiana should be curtailed *whenever* the plant's continued operation would interfere with passing "all ice as it arrives." Moreover, the directive was issued on behalf of the Division Director in 1964 and was thus subject to change by that official's successors or superiors.[7] Thus, when then-Division Director Heiberg decided with his subordinates in 1978 "that the need to generate power should prevail" (Pet. App. A18), no "pre-existing policy judgments by [his] superiors" (Pet. 13) stood in the way.

Nor did the 1964 directive divest the Corps of discretion to take the other actions that the court of appeals held to be within the discretionary function exception. Significantly, the order predated the immobilization of the submergible tainter gates and thus contained much inapposite material on the use of that means of passing ice. See Pet. App. A162. Stripped of that material, the order framed the very choice—between passing ice and protecting the dam's integrity—that called for the exercise of policy judgment. See *id.* at A22. The order stated that "all ice" should be passed "as it arrives," but also noted that gate sills were

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[7] The 1964 order, having application only to Corps personnel, was not published in the Federal Register (see 5 U.S.C. 553(a)(2)) and was subject to change by Corps officials of appropriate rank without regard to the procedures of the Administrative Procedure Act. There was substantial evidence that the order had been supplemented in the 14 years between its issuance and the events relevant to this case. See Gov't C.A. Br. 20-21.

potentially vulnerable to erosion, making it "necessary that operations be so arranged that hazardous downstream scour is prevented." *Id.* at A161-A163. The order recognized, rather than eliminated, the need to weigh these conflicting considerations as they might be presented in particular instances.[8] Finally, with respect to coordination between Markland and Meldahl, the order was entirely silent on whether and how any facilities might operate in tandem.[9]

It is thus not surprising that the court of appeals found it unnecessary to address the implausible argument that the Division Director's 1964 order divested Corps officials of all discretion, in choosing a course of action for the Markland complex in January 1978, to consider Southern Indiana's need for hydroelectric power, the long-term integrity of the dam, and the value of moving traffic down-

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[8] In fact, the Corps had promulgated a "Gate Operation Plan" (DX 509) forbidding the use of a few adjacent gates to pass ice. This plan stated, "Because of the stone protection below the dams, large volumes of water will never be passed through a few gates." *Ibid.*

Petitioners suggest, referring to an excerpt from the 1964 order, that Corps officials at Markland should have recognized "the alternative * * * of raising the nonsubmergible gates and skimming ice over bulkheads placed in front of the gates." Pet. 13. The district court's opinion is silent on the availability and effectiveness of this technique under the facts of this case. The court of appeals did not address it.

[9] Indeed, even with respect to ice management, the regulation called for the exercise of judgment. As the order suggests, non-moving sheet ice is beneficial; it retards the creation of additional ice and presents few problems to navigation. Pet. App. A9; Tr. 4-272 to 4-273, 4-536. The Corps thus adapted a general policy to maintain stable ice and the efficacy of such a policy was commonly understood by all: "Any time you can keep ice stationary in one place, you're better off." Tr. 4-264. Even petitioner's expert, Mr. Lazier, agreed that the maintenance of an ice cover was needed to protect Markland's hydroelectric plant and to keep it operating. Tr. 402-403.

river in the days preceding the casualty.[10] Moreover, the question raised by that contention is very narrow. After *Berkovitz,* there can be no dispute that a negligent failure to comply with a regulation that compels a particular course of action is not protected by the discretionary function exception. The Sixth Circuit did not suggest otherwise. Thus, the petition presents only the question whether the 1964 order, which was superseded no later than 1978, had the meaning and effect that petitioners attribute to it. That question does not call for this Court's review.

2. This is at least the fourth case in which the Court has been asked to review the question whether the government can be held liable for discretionary acts or omissions in suits brought under the Suits in Admiralty Act. *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Brown* v. *United States*, 790 F.2d 199 (1st Cir. 1986), cert. denied, 479 U.S. 1058 (1987).[11] Like their predecessors, petitioners argue (Pet. 15-22) that the "plain meaning" of the SIAA excludes any exception for discretionary acts or omissions, and they point to a purported conflict between *Lane* v. *United States*, 529 F.2d 175, 179 (4th Cir. 1975), and the decisions of every other court of appeals that has since considered the issue,

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[10] The question whether the order divested Corps personnel of discretion to weigh policy considerations was dependent on the order's legal effect, and thus the court of appeals' review was not constrained by the clearly erroneous standard.

[11] The petition does not cite *Bearce* or *Brown* and omits any citation to the denial of certiorari in *Gercey*.

An asserted conflict between *Lane* and decisions of other courts of appeals on a related point was also the subject of the petition in *Chute* v. *United States*, cert. denied, 446 U.S. 936 (1980).

Gercey v. *United States, supra*; *Bearce* v. *United States, supra*; *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980); *Estate of Callas* v. *United States*, 682 F.2d 613, 619 (7th Cir. 1982); *Gemp* v. *United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Brown* v. *United States, supra*; *Williams* v. *United States*, 747 F.2d 700 (9th Cir. 1984), aff'g per curiam 581 F. Supp. 847, 849-852 (S.D. Ga. 1983); *Wiggins* v. *United States*, 799 F.2d 962, 964-966 (5th Cir. 1986); *Chotin Transportation, Inc.* v. *United States, supra*; See *Gordon* v. *Lykes Brothers Steamship Co.*, 835 F.2d 96, 98-99 (5th Cir.), cert. denied, 109 S. Ct. 73 (1988). Petitioners' contentions have no more force in this case than in the earlier cases in which the Court has denied review.

a. Notwithstanding the absence of an express exception like that in the Federal Tort Claims Act, 28 U.S.C. 2680(a), the court of appeals' virtually unanimous unwillingness in SIAA cases to impose liability on the United States for discretionary functions is well-founded. As this Court noted in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984), the FTCA's express discretionary function exception was added only to confirm the immunity that courts were expected to recognize in any event. As the legislative history reflects (*ibid.*):

> It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction; nevertheless, the specific exception was added to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action.

Accord *Dalehite* v. *United States*, 346 U.S. 15, 27 (1953).

That belief was in accord with the courts' longstanding reluctance to "inquire how the executive, or executive of-

ficers, perform duties in which they have discretion." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Imposition of liability on the theory that policymakers have negligently exercised discretion would permit " 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814. See also *Canadian Transport Co.* v. *United States*, 663 F.2d at 1086 (suggesting that such an interpretation would raise questions under the separation of powers doctrine).

The legislative history of the SIAA also forecloses any notion that the Act waives sovereign immunity for the allegedly negligent performance of discretionary functions. Until 1960, admiralty claims of the sort in issue in this case would have been brought in a district court under the FTCA, subject to the Act's express discretionary function exception. In that year, the SIAA, which had previously been limited to claims involving merchant vessels, was extended to any action against the United States which would have been maintainable in admiralty "if a private person or property were involved." 46 U.S.C. 742. As this Court concluded in a related context in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 170-178 (1976), the amendment was designed to eliminate confusion on where maritime actions should be brought and not to alter the scope of sovereign immunity or the principles governing liability in tort suits against the government. Thus, in *United Continental Tuna*, the Court held that suits falling within the Public Vessels Act, 46 U.S.C. 781 *et seq.* (Supp. IV 1986), could not be brought under the SIAA, even though they might be encompassed by the plain language of the latter statute. Here, similarly, it is untenable to attribute to Congress the intention of radically expanding the government's liability for mari-

time torts by means of an enactment that merely transferred such suits from the civil to the admiralty side of the district courts' dockets.

In view of this history and the background of the FTCA's express exception, the post-*Lane* decisions have preserved, "by judicial construction," the immunity for discretionary acts that was available when suits of this type were brought under the FTCA. Any different view would drastically expand the government's potential liability in admiralty cases, would conflict with the settled understanding of the origins of the express discretionary function exception in the FTCA, and would contradict this Court's explanation of the effect of the 1960 amendment to the SIAA.

b. Any conflict between the Fourth Circuit's decision in *Lane* and subsequent decisions in other circuits does not call for review by this Court. *Lane* predated this Court's decision in *United Continental Tuna Corp.*, and did not address any of the grounds on which other courts have relied in reaching the opposite conclusion. Moreover, in *Faust* v. *South Carolina State Highway Department*, 721 F.2d 934, 939 (1983), cert. denied, 467 U.S. 1226 (1984), the Fourth Circuit cast doubt on its continued adherence to *Lane*. It held that the government had no statutory duty to regulate obstructions in navigable waterways that would support an action for negligence. Although the *Faust* court did not rely on the discretionary function exception as such, it found support for its conclusion in cases that held, in its words, that the issuance of permits for such obstructions was "an unreviewable discretionary function." *Ibid.* As the Fifth Circuit has noted, *Faust* "has weakened or cast doubt upon the holding in *Lane*." *Wiggins* v. *United States*, 799 F.2d at 965.[12] In the absence of

[12] The reasoning of *Magno* v. *Corros*, 630 F.2d 224, 229 (1980), cert. denied, 451 U.S. 970 (1981), in which the Fourth Circuit rejected

any indication that the Fourth Circuit would adhere to *Lane* in the face of subsequent developments, that aberrant decision does not justify the Court's review.

3. Petitioners' contention (Pet. 23-26) that the court of appeals misapplied the "clearly erroneous" standard of review is meritless. The court of appeals overturned one finding of fact—the trial court's determination that the failure to divert water from the hydroelectric plant was a decision made by the lockmaster at Markland—because that finding lacked any support in the record. The court carefully identified the testimony on which its determination was based. Pet. App. A18.[13] By contrast, although

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a claim that the United States could be held liable for negligence in marking a dike with navigational aids, casts further doubt on *Lane*. There, citing *Gercey* v. *United States, supra,* the court observed that imposition of liability based upon alleged negligence in marking obstructions would "in effect direct the Coast Guard how to spend its limited resources." 630 F.2d at 229.

[13] We quote at greater length the testimony of then Division Director Heiberg, on which the court of appeals relied (Tr. 4-372 to 4-375):

> * * * [B]ecause of the extreme importance and the implications of cutting down the water at power plants *** it came to my attention. I do not like to be surprised by things like that.
>
> * * * [W]e decided to keep the water flowing. And that was a decision that was shared between the district engineer and myself. We were both involved in that decision.
>
> * * * There were several factors that were weighed. I mentioned the extreme cold weather at the time. There had been no coal * * *. There was a coal strike and supplies were low. And we had the frozen condition of the river slowing down the delivery of coal, and coal supplies were slow, and this was weighing heavily on everyone's mind. ***
>
> One thing that weighed was maintaining the navigation on the river. * * *
>
> But at the same time, power was * * * important. * * *
>
> The states were interested * * * in maintaining as much power as we could so people could have light and heat and other essentials.

petitioners assert that the district court weighed opposing testimony on this point (Pet. 24), they neither cite nor quote any. There is no conflict between the court of appeals' analysis and *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985), or any other decisions of this Court.[14]

Petitioners' other criticisms of the court of appeals' analysis of the facts of the case are equally unfounded. The court did not "reverse[] the findings * * * that the Corps was negligent in: (1) failing to coordinate ice-passing activities between Markland and Meldahl; (2) failing to compensate for the immobilization of the submergible tainter gates; and (3) failing to pass ice at Markland." Pet. 25. Rather, the court determined that the effect of those findings was to impose liability on the government for discretionary judgments whose correctness the court refused to "second-guess." Pet. App. A20-A23.[15] Nor did

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> Those were all weighing on the specific decision on whether we were going to cut down the amount of water that went through the turbines.
>
> * * * [I]t was essentially my decision—[I] came out on the side of maintaining the water going through the turbines at Markland.

Contrary to petitioner's assertion (Pet. 24), the testimony of lockmaster Sheldon was entirely consistent with this account. Tr. 763-764.

[14] Even if the decision not to restrict the flow of water to the hydroelectric plant had been made by the lockmaster, that decision would have been no less protected than that of his superiors—unless he had no discretion to exercise. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813.

[15] The court of appeals did carefully analyze the nature of the acts on which the district court relied. For instance, while the district court characterized as negligent the Corps' "fail[ure] to pass floating ice at the Markland Dam as it arrived at the dam, whether through use of the underflow gates or otherwise" (Pet. App. A137), the court of ap-

it "weigh" or "disregard" evidence when it concluded that other actions by Corps personnel, "standing alone, were not substantial factors in causing the disaster." *Id.* at A23. The district court found that the failure to reduce the flow of water to the hydroelectric plant in order to pass ice was the principal cause of the disaster: "By permitting the continuous diversion of the maximum amount of water to the hydro plant when a simple telephone call could have made that water available for ice passage for some period or periods each day, the Corps dealt a death knell *to any possibility* of managing the tremendous amounts of ice which were coming on the dam." Pet. App. A138 (emphasis added). Once the court of appeals found that this course of action could not be the basis for liability, the district court's own characterization of its significance required the conclusion that any negligence in the performance of non-discretionary acts was not determinative of the outcome. Nothing in the district court's opinion sug-

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peals focused on the particular determinations that contributed to that situation and identified the extent to which the overall "failure" was determined by discretionary judgments (*id.* at A17-A23). Plainly, if those underlying decisions were discretionary, the court could not impose liability on the theory that the resulting failure to pass ice was not. In the same vein, the appellate court properly declined to accept the notion that a lapse in "coordination" between Markland and Meldahl could serve as the basis for liability. As the panel recognized, if the operation of the Markland facility involved protected discretion, the exercise of that discretion could not properly be characterized as negligent on the theory that it was not properly coordinated with the actions of another facility. See *id.* at A20-A21. Finally, any holding that the immobilization of the tainter gates was a discretionary function, but a failure to "compensate" for that step was not, would gut the discretionary function exception. In each of these instances, the court of appeals did not engage in de novo review of factual findings. It simply refused to join in legal characterizations whose effect was to admit by the back door liability excluded by the discretionary function exception at the front entrance.

gests that better surveillance, better training, or better use of the auxiliary lock would have enabled the Corps to take the discretionary actions found by the court of appeals to be protected from liability and still pass the amounts of ice that the district court found were responsible for the disaster.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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